No. 79-200

In the Supreme Court of the United States

OCTOBER TERM 1978

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL., PETITIONERS

v.

ISLESBORO SCHOOL COMMITTEE, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Islesboro School Committee, Board of Directors of Maine School Administrative District No. 5, Board of Directors of Maine School Administrative District No. 33, Winslow School Committee and Brunswick School Board (hereinafter "the Respondents") hereby oppose the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the First Circuit (hereinafter "the Petition") filed by Patricia R. Harris, Secretary of Health, Education and Welfare (HEW) and the other federal parties to this action ("the Petitioners").

QUESTIONS PRESENTED

1. Whether a sufficient case or controversy continues to exist between the parties.

2. Whether the HEW regulation codified in 45 C.F.R. §86.57(c) is valid.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the statutes and regulations set forth in the Petition, the following constitutional provisions and statutes are involved.

1. Tenth Amendment, United States Constitution:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

2. Title VII of the Civil Rights Act of 1964, §701(k), 42 U.S.C. §2000e(k):

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. . . .

3. Title 5, Maine Revised Statutes Annotated §4572-A, P.L. 1979, c. 79, 1979 Me. Legis. Serv. 266:

> **Unlawful employment discrimination on the basis of sex.**

1. **Sex defined.** For the purpose of this Act, the word "sex" includes pregnancy and medical conditions which result from pregnancy.

2. **Pregnant women who are able to work.** It shall be unlawful employment discrimination in violation of this Act, except where based on a bona fide occupational qualification, for an employer, employment agency or labor organization to treat a pregnant woman who is able to work in a different manner from other persons who are able to work.

3. **Pregnant women who are not able to work.** It shall also be unlawful employment discrimination in violation of this Act, except where based on a bona fide occupational qualification, for an employer, employment agency or labor organization to treat a pregnant woman who is not able to work because of a disability or illness resulting from pregnancy, or from medical conditions which result from pregnancy, in a different manner from other employees who are not able to work because of other disabilities or illnesses.

4. **Employer not responsible for additional benefits.** Nothing in this section shall be construed to mean that an employer, employment agency or labor organization is required to provide sick leave, a leave of absence, medical benefits or other benefits to a woman because of pregnancy or other medical conditions which result from pregnancy, if this employer, employment agency or labor organization does not also provide sick leaves, leaves of absence, medical benefits or other benefits for his other employees.

5. **Small business exception.** Notwithstanding the provisions of subsection 3, employers with 15 or less employees shall not be required to provide medical benefits because of pregnancy or other medical conditions which result from pregnancy.

4. Title 20 Maine Revised Statutes Annotated §1951 (Supp. 1978):

> **Minimum sick leave.**
>
> Each administrative unit operating public schools within the State shall grant all certified teachers, except substitute teachers as defined by the commissioner, a minimum annual sick leave of 10 school days accumulative to a minimum of 90 school days without loss of salary . . . . Full-time teachers assistants and teachers aides shall be granted minimum annual sick leave of 10 school days.

STATEMENT OF THE CASE

The Petitioners' Statement of the Case fails to mention several significant judicial and legislative developments that have occurred since the district court decision, which developments, as the court of appeals observed, have rendered the substantive question presented of "largely academic interest". *Islesboro School Committee v. Califano*, 593 F. 2d 424, 430 (1st Cir. 1979).

First, in August of 1978, the Maine Supreme Judicial Court held that pursuant to a state sick leave statute, 20 M.R.S.A §1951, disabilities resulting from pregnancy must be treated as any other temporary medical disability with respect to paid sick leave benefits. *Murray v. Waterville Board of Education*, 390 A. 2d 516 (Me. 1978). Moreover, on October 31, 1978, Congress amended Title VII of the Civil Rights Act of 1964 by adding a prohibition against the disparate treatment of pregnancy as a disability. P.L. No. 95-555, 92 Stat. 2076, 42 U.S.C. §2000e(k). Finally, subsequent to the court of appeals decision herein, the Maine Legislature amended the Maine Human Rights Act by adding a similar prohibition, which became effective on September 14, 1979. Title 5 M.R.S.A. §4572-A, P.L. 1979, c. 79, 1979 Me. Legis. Serv. 266.

As a result of these developments, the Respondents are obliged both as a matter of state and federal law to treat pregnancy

disabilities the same as other temporary disabilities for employment-related purposes without regard to the validity of 45 C.F.R. §86.57(c).

ARGUMENT

A. The Petition should be denied because there is no longer a sufficient case or controversy between the parties.

The controversy which gave rise to this case is now academic. As a result of the decision of the Maine Supreme Judicial Court in *Murray, supra,* and the recent amendments to Title VII of the Civil Rights Act of 1964 and to the Maine Human Rights Act, the Respondents have been required to alter their sick leave policies to eliminate any disparate treatment of pregnancy-related disabilities. The question of the validity of 45 C.F.R. §86.57(c) has, therefore, lost its vitality in the context of this case and is essentially moot. Under these circumstances, certiorari should be denied. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955); *Cook v. Hudson*, 429 U.S. 165 (1976).

The Petitioners' characterization of the Question Presented (Petition at 2) as the broader question of the authority of HEW to promulgate employment regulations generally under Title IX is plainly insufficient to create a live case or controversy because the facts involved in this action raised only the narrower question of the validity of the regulation promulgated in 45 C.F.R. §86.57(c). There is not now, nor has there ever been, a case or controversy between the parties as to any other employment regulation issued by HEW under Title IX.

B. The Petition should be denied because there is no conflict among the courts of appeals.

The three courts of appeals which have ruled on the question have uniformly concluded that Sections 901(a) and 902 of the Education Amendments of 1972, 20 U.S.C. §§1681(a) and 1682, do not authorize HEW to promulgate regulations pertaining to the employment practices of school districts and educational institutions receiving federal funds. *Islesboro School Committee*

v. Califano, 593 F. 2d 424 (1st Cir. 1979), *aff'g* 449 F.Supp. 866 (D.Me. 1978), *pet'n for cert. pending*, 48 U.S.L.W. 3118 (U.S. Aug. 28, 1979) (No. 79-200); *Junior College District of St. Louis v. Califano*, 597 F.2d 119 (8th Cir. 1979), *aff'g* 455 F.Supp. 1212 (E.D. Mo. 1978), *pet'n for cert. pending*, 48 U.S.L.W. 3118 (U.S. Aug. 28, 1979) (No. 79-201); *Romeo Community Schools v. HEW*, Nos. 77-1691, 77-1692 (6th Cir. June 20, 1979), *aff'g* 438 F.Supp. 1021 (E.D. Mich. 1977).[1] In view of the fact that the decision of the court of appeals below is consistent with the decisions of all the federal courts that have ruled on the question of the validity of HEW's Title IX employment regulations, there is no conflict presented for resolution by the Court, and the Petition should, therefore, be denied.

C. The Petition should be denied because the question of the validity of 45 C.F.R. §86.57(c) is not an issue of such importance as to justify review by the Supreme Court.

Petitioners argue that notwithstanding the uniformity of federal court decisions, this case presents an important question of federal law justifying certiorari because those decisions have "disrupted" HEW's Title IX enforcement program. (Petition at 11). For several reasons, the "disruption" alluded to in the Petition is insufficient to warrant Supreme Court review of this case.

First, in view of the recent amendment to Title VII of the Civil Rights Act of 1964, a federal remedy is now available for

[1]Moreover, all of the district courts' decisions are in accord. In addition to the district court decisions in *Islesboro, Junior College District* and *Romeo, supra, see Seattle Univ. v. HEW*, No. C-77-631S (W.D. Wash. Jan. 20, 1978), *appeal pending*, No. 78-1746 (9th Cir.); *Dougherty County School System v. Califano*, C.A. No. 78-30-ALB (M.D. Ga. Aug. 22, 1978), *appeal pending*, No. 78-3384 (5th Cir.); *Board of Educ. of the Bowling Green City School Dist. v. HEW*, No. C-78-177 (N.D. Ohio March 14, 1979), *appeal pending*, No. 79-3420 (6th Cir.); *University of Toledo v. HEW*, 464 F. Supp. 693 (N.D. Ohio 1979), *appeal pending*, No. 79-3270 (6th Cir.); *North Haven Bd. of Educ. v. Califano*, Civ. No. N-78-165 (D. Conn. Apr. 26, 1979); *Auburn School Dist. v. HEW*, No. 78-154-D (D. N.H. May 14, 1979), *appeal pending*, No. 79-1261 (1st Cir.).

employee claims of disparate treatment of pregnancy-related disabilities.

Second, the disruption alleged by the Petitioners will as readily be resolved by the Court's denial of the Petition as by the grant thereof.

Third, since Petitioners indicate that over 55% of Title IX complaints involve employment (Petition at 11), the invalidation of HEW's Title IX employment regulations would seem to leave HEW more resources to devote to the complaints initiated on behalf of the clearly intended beneficiaries of Title IX – the students.

Finally, all of the arguments on the merits raised in the Petition have been specifically addressed, thoroughly considered and appropriately rejected by the numerous federal courts that have addressed the question presented by the Petition.

D. The Petition should be denied because regardless of whether Title IX authorizes HEW to regulate employment practices generally, the regulation codified in 45 C.F.R. §86.57(c) is invalid on other grounds.

1. The denial of paid sick leave benefits for pregnancy-related disabilities does not constitute discrimination "on the basis of sex" under Title IX.

In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), the Court held that the denial of paid sick leave benefits for pregnancy-related disabilities did not constitute discrimination "because of. . .sex" under Title VII of the Civil Rights Act of 1964.[2] *See also Richmond Unified School District v. Berg*, 434 U.S. 158 (1977); *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977). For the same reasons as those stated by the Court in *Gilbert*, Title IX of the Education Amendments of 1972, which prohibits discrimination "on the basis of sex", does not cover pregnancy. While Title VII of the Civil Rights Act of 1964 was

[2]42 U.S.C. §2000e-2(a) (1).

recently amended to include "pregnancy" within the terms "because of sex" or "on the basis of sex", no such amendment has been made to Title IX. Accordingly, because the denial of paid sick leave benefits does not constitute discrimination "on the basis of sex" under Title IX, HEW lacked authority to promulgate the regulation codified in 45 C.F.R. §86.57 (c).

2. The Tenth Amendment to the United States Constitution stands as a bar against federal regulations that dictate sick leave policies of local school boards where Section 5 of the Fourteenth Amendment is not the source of authority for such regulations.

Because the denial of disability benefits for pregnancy does not constitute discrimination on the basis of sex sufficient to give rise to an equal protection claim under the Fourteenth Amendment, *Geduldig v. Aiello*, 417 U.S. 484 (1974), the underpinning for a federal regulation that would require a local school board to make such payments to its employees must be based on some other constitutional grant of Congressional authority. The Commerce Clause, U.S. CONST. art. I, §8, cl. 3, does not authorize such a regulation. *See National League of Cities v. Usery*, 426 U.S. 833 (1976). Nor does the Spending Power, U.S. CONST. art. I, §8, cl. 1, authorize such a regulation, for that power may not be construed to authorize Congress or HEW indirectly to subvert the principles of federalism inherent in the Tenth Amendment. Because Congress can erode the Tenth Amendment as effectively under the Spending Power as under the Commerce Clause, the limitations on the Commerce Power enunciated in *National League of Cities, supra,* would likewise be applicable to the Spending Power at least in situations where, as here, the Fourteenth Amendment is not the ultimate source of authority for the regulation in question.

CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted.

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